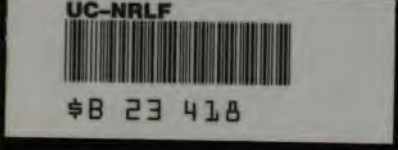

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ON
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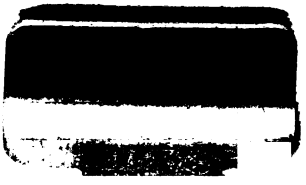
1911



COSTA RICA- PANAMA ARBITRATION

MEMORANDUM

ON

UTI POSSIDETIS

BY

JOHN BASSETT MOORE

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CONTENTS.

UTI POSSIDETIS.

In the discussion of the pending question, much prominence has at times been given to the subject of *Uti possidetis*. Especially is this the case with the Arbitration before the President of France, in which the representatives of Colombia (predecessor of Panama) endowed the phrase with an importance altogether factitious, making it, indeed, in the form of the *Uti possidetis juris*, the very foundation of their argument. This was all the more remarkable, because the words *Uti possidetis*, as we shall hereafter more fully show, nowhere occur in the treaties between the two countries. Nevertheless, the use which has been made of the phrase renders it necessary to present the matter in its various aspects.

I. Origin of the Term Uti Possidetis.

The term *Uti possidetis* is derived from the Roman Law, in which it designated an interdict of the Praetor, by which the disturbance of the existing state of possession of immovables, as between two individuals, was forbidden. As to the precise origin of the process, which lay outside the domain of the regular *legis actiones*, writers are not agreed. They also differ as to whether protection of the better right or prevention of a breach of the peace was the primary ground of the magistrate's intervention. Niebuhr, whose view has been widely accepted, finds the origin of the procedure in the measures resorted to for protecting the occupants of public lands, who, although

they could not show an original title and therefore could not maintain an action founded on ownership, received in their occupancy the recognition and sanction of the State.[1] To the possessor there was awarded, on the strength of his possession, the right to be free from disturbance by his adversary. To this extent the interdict served, in effect, in place of a regular title. In course of time, however, the interdict came to be used as an ancillary process, for the purpose of deciding which of the parties, as possessor, should have the advantage of standing on the defensive in a litigation to determine ownership. The formula employed by the Praetor was: *Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto.*

> "As you possess the house in question, the one not having obtained it by force, clandestinely, or by permission from the other, I forbid force to be used to the end that you may not continue so to possess it."

Or, as translated by an eminent authority:

> "Whichever party has possession of the house in question, without violence, clandestinity or permission in respect of the adversary, the violent disturbance of his possession I prohibit."[2]

The right of the possessor was not affected if his possession was begun by violence, clandestinely or by permission as regards any other person than the

[1] Muirhead, Historical Introduction to the Private Law of Rome, 2nd ed., 1899, p. 206.

[2] Poste, Gaii Institutionum, ed. 1871, p. 505.

adversary; and, as to the latter, there was simply a prohibition to disturb the *status quo,* even the question as to which of the parties was in possession and which was forbidden to interfere being left open.[3]

"In claiming," says Sohm, "an interdict, the juristic possessor claims, at the same time, a declaration recognizing his juristic possession, discontinuance of the disturbance, and damages for the disturbance which has already taken place. No one, however, is deemed a juristic possessor for purposes of this interdict, unless his juristic possession was acquired *nec vi nec clam nec precario ab adversario.* A person who has acquired juristic possession from his adversary in the suit either *vi* (i. e. by force), or *clam* (i. e. clandestinely, anticipating the opposition of his adversary and secretly evading it), or *precario* (i. e. on terms of revocation at will, no binding transaction being concluded with the grantor), is not held to have juristic possession for purposes of the possessory suit, the juristic possession being deemed, on the contrary, to vest in the adversary from whom the thing was acquired *vi, clam,* or *precario.*"[4]

"The interdicts *Uti possidetis* and *Utrubi* are," says Moyle, speaking of the time of Justinian, "for retaining possession, and are employed when two parties claim ownership in anything, in order to determine which shall be defendant and which plaintiff; * * * Where the dispute relates to the possession of land or buildings, the interdict called *Uti possidetis* is employed; * * * In *Uti possidetis* the party in possession at the issue of the interdict was the win-

[3] Muirhead, p. 347.

[4] 1 Sohm, Institutes of Roman Law (1910), p. 310.

ner, provided he had not obtained that possession from his adversary by force, or clandestinely, or by permission; whether he had obtained it from some one else in any of these modes was immaterial." (Moyle, Imperatoris Iustiniani Institutionum, 1883, pp. 201-204.)

The substance of the decree is embraced in the words *Uti possidetis, ita possideatis*: "As you possess, so may you possess." The interdict was briefly designated as *Uti possidetis*.

II. Meaning in International Law.

From the Roman law, the phrase *Uti possidetis* was transferred to the works on International Law, but without any of the technical significance and limitations which inhered in the Roman interdict. For this reason Bluntschli has criticised the use of the phrase by writers on International Law as inaccurate, since it denotes, in International Law, (1) not possession under private law but territorial sovereignty, and (2) not merely the recognition of possession but a definitive status.[5] The distinctions pointed out by the learned German publicist are universally admitted to be sound, but his criticism of the use of the phrase in International Law is not necessarily to be accepted, since it literally and appropriately conveys in this relation the precise meaning which it is intended to give. In International Law, the phrase no longer referred to a judicial or quasi-judicial procedure, resulting in the interdict of a supreme legal authority. Its fundamental object, in private law, of preventing and invalidating the use of force, no longer existed; for, by International Law, the use of force was lawful and the right of conquest

[5] Bluntschli, Le Droit International Codifié, ed. of 1895, Art. 715.

was recognized. Its entire meaning and application in International Law were aptly summed up and expressed in the words *Uti possidetis, ita possideatis,* "As you possess, so may you possess."

But, for the very reason that, in International Law, which lacked a supreme political authority and a supreme judicial jurisdiction, the use of force was lawful and the right of conquest was recognized, the principle of *Uti possidetis,* in the sense indicated, was a rule of peace; since it furnished a date from which rights were to be reckoned, without recurring to prior controversies and hazarding the consequences of their renewal.

"The accomplished fact," declares Rivier, "has, in the life of nations and in the law of nations, a capital and preponderant importance; it is the generator of right. In a stronger sense than in private law, we may apply here the principle expressed by Paul in these terms: 'Whoever the possessor may be, by this fact, because he is the possessor, he has more right than he who does not possess.' (Law II, Digest, *Uti possidetis,* 43, 17.) Says Bynkershoek: 'In all public causes the principle prevails: *Uti possidetis, ita possideatis.*' (Quaestionum juris publici [1737], Lib. II, Cap. III, p. 206.)"[6]

Again:

> "The basis of the negotiations [for peace] is given either by the *uti possidetis,* or *statu quo post bellum,* or by the *statu quo ante bellum.* The latter basis will not be presumed, the war having suppressed the former state of things and created a new state of things. We know the

[6] Rivier, Principes du Droit des Gens, I, 55.

important rôle which belongs in the law of nations to the accomplished fact and to possession."[7]

"The treaty of peace," says Wheaton, "leaves everything in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title forever. * * * The *uti possidetis* is the basis of every treaty of peace, unless the contrary be expressly stipulated."[8]

"As between the belligerent powers themselves," says a recent writer, "it is held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations to the contrary are contained in the treaty. This is called the principle of *Uti possidetis,* and it is of very wide and far-reaching application. * * * Arrangements that seem at first sight to be pedantic in their minuteness are often necessary to carry out the intentions of the parties in the face of the rule that, when there are no express stipulations to the contrary, the principle of *uti possidetis* prevails."[9]

[7] Id. II., 450.

[8] Wheaton's Elements, Lawrence's ed. 1863, pp. 878-882, 886.

[9] Lawrence, Principles of Int. Law (4th ed. 1910), pp. 571, 572. See, to the same effect, Walker, Science of Int. Law, 372; Ferguson's Manual of Int. Law. II., 559; Halleck, Int. Law, Baker's ed. (1908), I., 345; II., 537; Oppenheim, Int. Law (1906), II., 287.

Finally, we may quote the words of a distinguished Argentine publicist, who in turn cites an eminent publicist of Chile, as follows:

> "The peace, when the treaty contains no contrary stipulation, either does not change the situation in which things are found at the moment of its conclusion, or re-establishes them in the same state as before the war. In the first case, if nothing is said on the subject, the countries and places occupied and conquered remain in the power of the party who occupies them, by the application of the rule *uti possidetis.* * * * According to Bello, 'the clause which replaces things in the state anterior to the war, *in statu quo ante bellum,* has relation solely to territorial properties and is limited to changes which the war has produced in their natural possession; the basis of actual possession, *uti possidetis,* relates on the contrary to the epoch indicated in the treaty of peace, or, in default of any, to the date of the treaty itself."[10]

III. Application of Principle to International Boundaries.

Not only in cases where, as the result of war, possession of territory has been obtained by force, but also in cases where, as the result of discovery, exploration and settlement, possession has been acquired by occupation, the principle of *uti possidetis,* as understood in International Law, has played an important and often a decisive part. This has been so of necessity. Within the past four hundred years vast territories, imperial in extent, have been added to the domain of civilization. In the process of their absorption, the colonizing powers of Europe entered into active competition.

[10] Calvo, Droit Int. (ed. 1896), §3150, V. 380.

Settlements were formed and titles were established; but, even where the titles were acknowledged, the boundaries as between adjacent proprietors remained to be determined. The task of delimitation was difficult and complicated. Not only was the process of occupation gradual, but conflicting rules were set up as to the extent to which the occupation of a certain place gave a right of possession. In the course of time, as effective control was established and the settlements of different proprietors approached each other, the question of boundaries, perhaps originally of slight practical importance, became acute. On what principle was the difficulty to be solved? In the last analysis the contestants often were obliged, in the midst of conflicting and irreconcilable claims of right, to accept as the only possible solution the principle of actual possession—the *uti possidetis.*

In saying this, however, it is by no means intended to suggest that, in adopting the principle of *uti possidetis,* the contracting parties always supposed either that they had found a perfect solvent of their difficulties or that they had excluded from consideration titles founded on legal documents or dispensed with the necessity of recurring to legal principles. Possession itself was often controverted both in the actual and the legal sense. Facts alleged on one side were denied on the other, and, even had they been admitted, different views were entertained as to their effects, especially as to the extent to which possession could properly be said to have been acquired. For example, Great Britain, in the controversies leading up to the Seven Years' War, contended that she had a right, founded on the discovery and possession of certain por-

tions of the Atlantic Coast, to extend her sovereignty by given latitudes to the Pacific, i. e., from sea to sea. This claim was opposed by France and Spain, and was abandoned by Great Britain in the treaty of 1763, which established the Mississippi as the western boundary of her possessions. The United States, on the other hand, in the discussions with Spain as to boundaries, in 1805, laid down the principle that when a nation "takes possession of any extensive seacoast, that possession is understood as extending into the interior of the country, to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right, in exclusion of all other nations, to the same."[11] Referring to this rule, one of the most eminent of recent publicists suggests that it perhaps may be qualified by the "tacit reservation" that "the extent of coast must bear some reasonable proportion to the territory which is claimed in virtue of its possession."[12]

An examination of boundary settlements will further show that, in its practical application to such settlements, the principle of *uti possidetis* has also been employed in an ancillary sense, as an aid to the understanding and establishment of claims founded on documentary titles rather than as a means of overriding them. In such cases the question may be considered as one compounded of law and of fact, and calling for an equitable solution.

[11] Messrs. Monroe and Pinckney, American Plenipotentiaries, to Don Pedro Cevallos, Minister of State of Spain, April 20, 1805, 2 Am. State Papers, Foreign Relations (folio), 664.

[12] Hall, International Law, 4th ed., p. 111.

IV. The Principle of Uti Possidetis in Latin-America.

Nowhere has the principle of *Uti possidetis* been more frequently invoked than in the adjustment of boundaries in Latin-America. This circumstance is to be ascribed, not to any theoretical preference for the principle among the peoples concerned, but to the simple fact that the conditions there existing—conditions growing out of the gradual exploration and settlement of vast regions previously unknown—required its introduction as the only practical basis of delimitation. "Frequent conventions," says an eminent Chilean publicist, "were concluded on the subject of boundaries. But, whether or not the boundary lines thus established were drawn on the authority of the *uti possidetis* of 1810, they were vague and sometimes conflicting, owing to the lack of precise geographical knowledge of the regions affected. For this reason, all the states of America have had boundary disputes with all of their neighbors. The peculiar geographical situation of these countries, located on the coast and with territory extending in toward the centre of the continent and delimiting several states at the same time, made such a clash inevitable. Brazil, for example, touches the frontiers of all the states of South America and the three Guianas, with the exception of Chile. Furthermore, the disputes extended over immense zones of territory, which were oftentimes claimed by two or more States at one and the same time. It may be said that a very considerable part of the diplomatic history of Latin-America reduces itself to an account of the struggle over boundaries. For this reason, and

because of their great political and economic significance, these contests occupy a place of capital importance in that history. They have given rise to armed invasions or to occupations of the tracts in litigation, by one of the interested parties and have, on more than one occasion, led to war. They have, as well, created interesting new problems of International Law: e. g., the rights and duties of the interested states in the territory in dispute, during the process of the contest; the value of *bona fide* acts of occupation in it; the responsibility of the States for acts of civilized persons or native tribes committed in the contested zones."[13]

It is a matter of common knowledge that, after the first discoveries of Columbus were made known in Europe, the Pope, Alexander VI., by a Bull issued on May 4, 1493, declared that all lands discovered and to be discovered "to the west and south" of a line drawn, from the North to the South Pole, 100 leagues "west and south" of the Azores and Cape Verde Islands, and not in the actual possession of any Christian power, should belong exclusively to Spain.[14] This line proving to be unacceptable to the Portuguese Government, it was modified by the treaty of Tordesillas of June 7, 1494, by which a dividing line between the lands discovered or to be discovered by Spain and Portugal was drawn at 370 leagues west of the Cape Verde Islands. The Papal Bull, as modified by the treaty of Tordesillas, is often referred to by writers as having divided the "New World" between Spain and Portugal; but a moment's consideration will convince us

[13] Alvarez, American Problems in International Law, 23-24.
[14] Dumont, *Corps Diplomatique*, vol. III., part 2, pp. 302-303.

that this conception of the matter involves an anachronism. As much as fifteen years after the first discoveries of Columbus, although one may find on the map a segment of what we now know as the continent of South America, he will also find to the north, lying between Europe and Asia, a vast stretch of ocean, obstructed only by a few islands.[15] The New World, as we now know it, was still unknown, so that, however broad the terms of the Papal Bull and the treaty of Tordesillas may be, there was no actual concrete intention of dividing between Spain and Portugal the continents of North and South America. Nor was this all. When in later years the American continents were revealed, and Spain and Portugal had prosecuted their discoveries not only in the Western Hemisphere but also in the Eastern, it was found to be impossible to apply the line of demarcation of the fifteenth century. Owing to the defective state of geographical science, no agreement could be reached even as to the length of a degree on a great circle, the extent of a league was undetermined, and no man could tell where the line, even if it were to be adhered to, should actually run. Moreover, each country had, in its explorations and settlements, overstepped what the other conceived to be its proper sphere, so that any attempt to run the line would necessarily involve sacrifices. If it were fixed at one place, Portugal must give up a part of Brazil; if it were fixed at another, Spain must give up the Philippines.

As the only way out of their difficulty, the two Crowns decided to renounce their ancient disputes, and

[15] See Ruysch's *Nova et universalior Orbis cogniti tabula,* Romae 1508, in Nordenskiöld's *Facsimile-Atlas,* 1889, p. 63 et seq., map xxxii.

"agreed in consigning to oblivion the rival claims growing out of the demarcation line, and began all over again, declaring Alexander's Bull and the treaty of Tordesillas and others based thereon all null and void."[16]

This conclusion, which was merely the necessary summary of existing conditions, was formally announced in the treaty between Spain and Portugal, signed at Madrid, January 13, 1750. In this treaty the contracting parties declared that they had resolved to put an end to past and future disputes and to forget and desist from all actions and rights which they might have had by virtue of previous treaties, agreements, or acts, and *to observe two rules, the first of which was that the best-known landmarks, such as the sources and courses of rivers and the most notable mountains, should be adopted in defining the boundaries, and the second, that each party should remain in possession of what it then held, with the exception of such mutual cessions as should be made for purposes of convenience, in order that the boundaries might be as little subject to controversy as possible.*

Owing to historical incidents which need not be here detailed, the divisional line, the bases of which were thus indicated, was not actually run, and when the colonies of Spain and Portugal became independent their common frontiers remained unmarked; but the principle of *uti possidetis* was preserved. Thus by the treaty of limits between Brazil and Uruguay, concluded at Rio de Janeiro, October 12, 1851, it was declared (Art. II.) that the contracting parties recognized

[16] The Demarcation Line of Alexander VI., *Yale Review*, vol. I., p 54.

"as the basis which is to regulate their limits the *uti possidetis.*"[17] By the treaty between Brazil and Peru, signed at Lima, October 23, 1851, it was agreed that the boundaries between the two countries should be "regulated on the principle of *uti possidetis.*" So, in the treaty of limits between Brazil and Venezuela, signed at Caracas, November 25, 1852, it was declared (Art. II) that the contracting parties agreed upon and recognized "as a basis for the determination of the frontier between their respective territories the *uti possidetis.*"[18] By the convention between Brazil and Paraguay concluded at Rio de Janeiro, April 6, 1856, the contracting parties agreed that they would "respect and reciprocally cause the present *uti possidetis* to be respected."[19] The same principle was recognized in the treaty of limits and the accompanying protocol between Brazil and the Argentine Confederation signed at Paraná, December 14, 1857.[20] These instruments are of special interest as showing the admixture of questions of fact and of law. The Brazilian plenipotentiary having in the protocol declared, in respect of certain debatable islands in the River Uruguay, that in agreeing, as he had done in Art. IV of the treaty, that the two governments should determine the matter "in conformity with the principles of international law," he did so on the understanding that "there was no intention of prejudging by that clause the facts of possession on the part of either nation, * * * which, moreover, he considered to be well understood, because the law of nations also sanctions the principle of *uti*

[17] British and Foreign State Papers, Vol. 40, p. 1151.
[18] Br. & For. State Papers, vol. 49, p. 1213.
[19] Br. & For. State Papers, vol. 46, p. 1304.
[20] Br. & For. State Papers, vol. 49, p. 1316.

possidetis as a legitimate title to territorial ownership," the Argentine plenipotentiary replied that he could not "acknowledge any possession which was not by reason of the sovereignty which the Empire had over one of the banks and the moiety of the river."[21]

Finally, in the treaty between Brazil and Bolivia, concluded at La Paz, March 27, 1867, the contracting parties agreed (Art. II) "in recognizing as a basis on which to determine the boundaries between their respective territories, the *uti possidetis.*"

V. Its Application in Spanish America.

1. *Origin of the Spanish-American States.*

As has been seen, the peoples of Spanish America became familiar with the principle of *uti possidetis* in the colonial days, when, with their neighbors of Portuguese nationality, they engaged in territorial disputes which their home governments sought to adjust. After their emancipation, they found occasion to invoke the same principle as between themselves.

Prior to the emancipation, Spanish America was divided into four viceroyalties: Mexico, Santa Fé (New Granada), Peru, and Buenos Aires; and into seven captaincies-general: Cuba, Porto Rico, Santo Domingo, Yucatan, Guatemala, Caracas (Venezuela), and Chile. What an eminent Chilean publicist has termed the "supersensitive spirit of national independence,"[22] but what might with equal justice be regarded as the manifestation of local attachments inevitably resulting from generations of association and confirmed

[21] Id. 1318.
[22] Alvarez, American Problems in International Law, 21

habits of political thought and action, caused these administrative divisions to split up into independent states. Colombia, as successor of the viceroyalty of Santa Fé (New Grenada), and Venezuela, as the successor of the captaincy-general of Caracas, date their movement of emancipation from 1810. November 27, 1811, representatives of five provinces of Santa Fé adopted at Bogota a federative compact, constituting The United Provinces of New Granada. In this compact, while declaring their wish to establish a general government which should exercise the powers "proper and peculiar to the nation, considered as one and indivisible," they reserved to each of the provinces "its liberty, sovereignty, and independence in all matters which do not concern the common weal," and particularly guaranteed, not to the nation, but to "each" of the provinces "the integrity and inviolability of its territories."[23] In December, 1819, a Congress of delegates of Venezuela and New Granada declared these two States to be united under the name of Colombia; and into this union Bolivar incorporated in 1822 the territories of Quito and Guayaquil. In 1829 Venezuela detached herself, while in 1830 Quito and Guayaquil formed a republic called Ecuador. The ancient New Granada, left alone, resumed its original name, which it again dropped in 1857 for that of Colombia.[24]. The ancient Viceroyalty of Buenos Aires, dating its movement of emancipation, as also does Chile, from 1810, declared itself independent in 1816, under the name of the United Provinces of the Rio de la Plata; but the territory, to which it in whole or in part laid claim, came

[23] 1 Br. & For. State Papers, part 2, pp. 1069-1089.

[24] See Alvarez, Le Droit International Américain, 62-63.

sooner or later to form the four independent states of Argentina, Paraguay, Uruguay, and Bolivia. The ancient captaincy-general of Guatemala, declaring its independence in 1821, became in 1823 the Republic of the Centre of America, which later broke up into the five independent states of Guatemala, Salvador, Honduras, Nicaragua, and Costa Rica. Peru dates her independence from 1824. It is needless to say that the establishment of the various independent governments which have been enumerated did not take place without frequent armed conflicts, into the history of which it is unnecessary now to enter.

2. *Absence of Definite Boundaries.*

When the process of emancipation was complete, not a single boundary line had been actually agreed upon and defined, much less marked. Even where attempts were made to indicate them, the indications were insufficient or defective, owing to the want of precise geographical data. The earlier laws, decrees and orders of the former Spanish government, home and colonial, were for the same reason necessarily insufficient.

The act, formulated in 1819 and adopted in 1821, uniting New Granada and Venezuela as the Republic of Colombia, declared that the territory of that Republic should be that comprehended within the limits of the ancient captaincy-general of Venezuela and the viceroyalty of New Granada, but that the "settlement of its precise boundaries" should be "reserved for a more suitable time."[25] The constitution of Vene-

[25] 9 Br. & For. State Papers, 696.

zuela, adopted in 1830, merely stated that the national territory comprised "all that which, previously to the political changes of 1810, was denominated the captaincy-general of Venezuela."[26] A similar definition, *mutatis mutandis,* was embodied in the constitution of New Granada of 1832.[27] It was only in 1881 that a treaty was concluded between the two countries referring their disputes as to boundaries to the arbitration of the King of Spain.

The treaty of perpetual union, league and confederation between Colombia and Peru, signed at Lima, July 6, 1822, contained the following stipulation:

> "Art. IX. The demarcation of the precise Boundaries which are to divide the Territories of the Republic of Colombia and the State of Peru, shall be arranged by a particular Convention as soon as the approaching Congress of Peru shall have authorized the Executive of that State to settle this point; and any differences which may occur on this subject shall be settled by conciliatory and peaceful measures, becoming brotherly and confederated Nations."[28]

Señor Revenga, Secretary of State for the Department of Foreign Affairs of Colombia, in his report to the Congress, Jan. 2, 1826, stated that, owing to the vicissitudes which Peru had experienced, the settlement of the frontier on that side had been postponed, but that there was reason to hope that it would be definitively settled; and he significantly added that in preparing instructions for the representatives of

[26] 18 Br. & For. State Papers, 1119.
[27] 19 Id., 911.
[28] 11 Br. & For. State Papers, 105.

Colombia "particular attention" had been paid to securing "the most convenient, clear and natural frontiers."[29] Finally, the two countries, by the treaty of Sept. 22, 1829, following a war between them, entered into the following stipulation:

> "Article V. Both parties acknowledge as the limits of their respective Territories those belonging to the ancient Viceroyalties of New Granada and Peru prior to their independence, with such variations only as they may deem it convenient to agree upon; to which end they engage to cede to each other, reciprocally, such small portions of Territory as may be necessary to fix the Boundary Line in a more natural and precise manner, and be better calculated to avoid offence and misunderstandings between the authorities and the inhabitants on the frontiers."[30]

The state of Ecuador having been formed out of the southern part of Colombia, it accepted, as its boundary with the latter country, the limits which, conformably to the Law of Colombia of June 25, 1824, "separated the provinces of the ancient Department of the Cauca from that of Ecuador."[31] Succeeding thus to the dispute between Colombia and Peru, Ecuador made in 1832 with Peru the following agreement:

> "Until a convention respecting the limits of the two States shall have been concluded, the present limits shall be recognized and respected."[32]

By the Treaty of Peace, Friendship and Alliance, signed at Guayaquil, Jan. 25, 1860, another stipula-

[29] 13 Br. & For. State Papers, 1010-1011.

[30] 16 Br. & For. State Papers, 1242, 1243.

[31] Treaty of Peace, Dec. 8, 1832, 20 Br. & For. State Papers, 1206, 1207, Art. II.

[32] Art. XIV, Treaty of Friendship, Alliance and Commerce between Ecuador and Peru, signed at Lima, July 12, 1832, 20 Br. & For. State Papers, 1311.

tion on the subject of boundaries was entered into. Territories claimed by Peru having been pledged or adjudicated to British creditors of Ecuador, the Peruvian negotiator produced certain documents, the chief of which was a Royal Decree of July 15, 1802, to substantiate the rights asserted by Peru to the territories of Quijos and Canelos. The government of Ecuador, recognizing the value of the documents, declared void the "adjudication," and agreed to rectify the boundaries and to this end to appoint a mixed commission. Meanwhile, the two countries engaged to accept as their limits "those which arise from the *uti possidetis* acknowledged in Article V. of the Treaty of September 22, 1829, between Colombia and Peru, and which were those of the ancient viceroyalties of Peru and Santa Fé, according to the Royal Decree of July 15, 1802," Ecuador reserving, however, the right to prove its title to Quijos and Canelos within the peremptory term of two years.[33]. As has been seen,[34] the "*uti possidetis*" of the treaty of 1829 was "the limits * * * belonging to the ancient viceroyalties of New Granada and Peru prior to their independence," the date of New Granada's independence being 1810 and of Peru's 1824. By a treaty signed at Quito, August 1, 1887, the two countries agreed to submit the question of their boundary to the King of Spain, whose award has never been rendered. The treaty laid down no rule whatever for the guidance of the arbitrator's decision. The controversy is currently stated to involve as to Ecuador two-thirds of the entire territory which she claims as her own.

[33] 50 Br. & For. State Papers, 1086, 1087.

[34] Supra, p. 23.

By the Definitive Treaty of Peace and Friendship between Bolivia and Peru, signed at Arequipa, Nov. 8, 1831, it was agreed (Art. XVI) that a commission should be named by the two governments "for the purpose of drawing up a topographical Map of their Frontiers and another the statistics of the Population located upon them, in order that, without detriment to the two States, such cessions may be reciprocally made as may be necessary for an exact and natural demarkation of their Boundaries; which shall be formed by the rivers, lakes, or mountains; it being understood that neither Bolivia nor Peru will refuse to make such transfers as may conduce to this object, on condition of their mutually giving such competent indemnifications, or compensations, as may be satisfactory to both Parties"; and it was further agreed (Art. XVII): "Until the fulfilment of the preceding Article, the existing Boundaries shall be recognized and respected."[35]

These stipulations were substantially repeated in the Treaty of Friendship and Commerce signed at Arequipa, Nov. 3, 1847.[36] This treaty was, however, approved by the Peruvian Government and Congress only with certain "modifications and suppressions," to which the Bolivian Government and Congress gave their consent. A new Treaty embodying these changes was signed at Lima, December 11, 1848. Article III of this treaty reads as follows:

[35] 19 Br. & For. State Papers, 1383, 1387-1388.
[36] 36 Br. & For. State Papers, 1137, 1138-1139.

> "III. A commission shall be appointed by both Governments charged with constructing a topographical map of their frontiers, for the purpose of restoring to either State the lands which have become intermingled with the actual frontiers, reestablishing their ancient landmarks with the view of avoiding doubts and confusion in future, both States engaging to preserve the territory which has always belonged to them, and not to demand or solicit any territory from the other either by way of transfer, compensation, or any other reason whatsoever."[37]

Fifteen years later, the boundary still remaining unadjusted, another treaty was concluded, Nov. 5, 1863, by which it was again agreed to appoint a Mixed Commission "to make the topographical chart of the frontiers, and to verify the demarcation according to the data and instructions" which should "be duly given by both the parties." This work was to "be taken into consideration for a Treaty of Limits" which should "be promptly concluded," and until these stipulations were carried out the "actual limits" were to be "recognized and respected."[38] Only within the past two years, as the result of an award of the President of the Argentine Republic, as arbitrator, supplemented by a compromise as to a part of the line awarded, has a conclusion been reached.

The boundary between Chile and Bolivia formed the subject of Treaties concluded August 10, 1866, January 8, 1873, August 6, 1874, and June 21, 1875. Contested sovereignty over two geographical degrees of territory was involved in the discussion. No general

[37] 37 Br. & For. State Papers, 794, 795.
[38] 55 Br. & For. State Papers, 837, 841.

principles were enunciated in the treaties. The present possession of the parties was entered upon under the treaty of peace of Ancon of 1883.[39]

By the Treaty of Peace, Friendship, Commerce and Navigation between the Argentine Republic and Bolivia, signed at Buenos Aires, July 9, 1868, it was agreed that the boundary should be arranged by a special convention, and that, until the demarcation should be made, possession should "confer no right to territories which did not belong in the first instance to either nation."[40] A *modus vivendi* was arranged, June 11, 1888, by which it was agreed (1) that, within the Chaco, a provisional line should be observed, with the stipulation that Bolivia should come to an understanding with Paraguay as to boundaries; and (2) that, outside the Chaco, where Bolivia borders on the Argentine Republic, neither Government was "to advance beyond its actual possessions." It was understood that this provisional arrangement was to imply no renunciation of territorial claims.[41]

In the Treaty of Limits of July 15, 1852, the Argentine Republic and Paraguay undertook to fix their boundaries by direct negotiation. No mention is made of the *uti possidetis* in any form; nor is any reference made to principles beyond the declaration that the contracting Governments, "with the view of fixing definitely the relations between the two States, founded on the principle of reciprocal interest, community of origin, and other circumstances that naturally unite them," had "resolved to establish where most neces-

[39] 56 Br. & For. State Papers, 717-719; 65 Id., 275-276; 71 Id., 897; Alvarez, American Principles of International Law, 22.

[40] 72 Br. & For. State Papers, 601-611.

[41] 79 Br. & For. State Papers, 832-833.

sary their territorial limits, establishing at the same time the bases on which commerce and navigation" should be "arranged between the two Republics."[42] By the Treaty of Limits of February 3, 1876, they drew a line without declaration of principles, but submitted to the Arbitration of the President of the United States, who duly rendered an award, the question of title to a certain portion of territory, including the Villa Occidental.[43]

By the Treaty of Friendship, Alliance, Commerce and Navigation, signed at Santiago, Nov. 20, 1826, the United Provinces of the Rio de la Plata and Chile bound themselves (Art. III) "to guarantee the integrity of their Territories, and to co-operate against whatever Foreign Power should attempt to alter, by force, their respective boundaries, as recognized before their emancipation, or, subsequently, in virtue of special Treaties."[44] Thirty years later, the Argentine Republic and Chile, by their treaty of peace, commerce and navigation, concluded Aug. 30, 1855, entered into the following stipulation:

> "Art. XXXIX. The two contracting parties recognize as the limits of their respective territories those which they possessed as such at the time of their separation from the Spanish dominion in the year 1810; and they agree to adjourn the questions which have been or may be raised on this matter, in order to discuss them later in a pacific and friendly manner, without ever having recourse to violent measures; and, in case they should not have brought about a

[42] 42 Br. & For. State Papers, 1256.
[43] 68 Br. & For. State Papers, 97.
[44] 14 Br. & For. State Papers, 968.

> complete agreement, to submit them to the arbitration of a friendly nation."

On this basis the adjustment proceeded, with negotiation, mediation, and arbitrations, till at length the divisional line was established, claims of right giving way, as Calvo has observed, to "arrangements of delimitation."[45]

Without undertaking here to review in detail the adjustments of boundary between the States of Central America, it suffices to say that they have adopted as a general basis of settlement the limits of the time of their independence, viewed in the light of the principles of international law and of considerations of equity and practical convenience. Thus, in the boundary convention between Guatemala and Honduras, of March 1, 1895, the contracting parties, after providing for the appointment of a mixed commission to make studies and surveys and propose bases of settlement, stipulated as follows:

> "Article VI. To take the necessary resolutions, the Contracting Governments, after the Mixed Commission shall have presented their Report, shall give their consideration to the observations and studies of said Commission, and the lines marked in public documents not contradicted by others of the same nature and of greater force, giving to each the value corresponding to it according to its antiquity and juridical efficacy; the extent of the territory which formed the ancient provinces of Guatemala and Honduras at the date of their independence; the dispositions of the Royal Ordinance of Intendants which then ruled; and, in general, all

[45] Calvo, Le Droit International, ed. 1896, I. 424.

documents, maps, plans, etc., which may lead to clearing up the truth, preference being given to those which by their nature should have greater force owing to their antiquity, or being more clear, just, or impartial, or for any other such good reason according to the principles of justice.

"Possession shall only be considered valid so far as it is just, legal, and well founded, in conformity with general principles of equity, and with the rules of justice sanctioned by the law of nations."[46]

In the Treaty of Tegucigalpa of 1894, under which Honduras and Nicaragua submitted their boundary question to the King of Spain, whose award was rendered in 1906, it was agreed that each of the Republics was the owner of the territory which, at the date of their independence from Spain, the date of which was reckoned as 1821, constituted, respectively, the Provinces of Honduras and Nicaragua.

Costa Rica and Nicaragua adjusted their boundary in 1858 by direct negotiation. The validity and effect of this settlement formed the subject of an arbitration before the President the United States in 1888.[47]

The unsettled boundary between Guatemala and Mexico has formed the subject of numerous conventions. In a preliminary agreement signed at New York, August 12, 1882, by President Barrios, of Guatemala, and Mr. Romero, the Mexican Minister in the United States, there may be noted the following clause:

"V. In the demarcation of the boundary line actual possession shall, as a general rule, serve

[46] 87 Br. & For. State Papers, 530, 531-532.

[47] Moore, International Arbitrations, II., 1945-1968.

> as the basis by which to be guided; but this shall not prevent said basis from being laid aside by both parties, by mutual consent, for the purpose of following natural lines, or for any other reason, and in such case the system of mutual compensations shall be adopted. Until the boundary line of demarcation be determined, each of the contracting parties shall respect the actual possession of the other."[48]

Referring to boundary disputes in Latin-America, a South American writer, heretofore quoted, has observed:

> "These contests have been terminated generally by compromise or arbitration. In these cases, the arbitral sentence has always given more importance to titles of occupation, possession, prescription, etc., established by the interested states, than to the economic condition in which these territories would remain in consequence of the award. Thus, it has more than once occurred that these contests have been resuscitated, or remain only latent so that some day they may again become a new cause of conflicts."[49]

3. *Uti Possidetis of the Date of Independence.*

In applying the principle of *uti possidetis* to their boundary settlements, the countries of Spanish America, in cases in which conquest has not played a part, have adopted as the time of its application the date of their independence,—a criterion in no sense specially

[48] 73 Br. & For. State Papers, 272, 273.

[49] Alvarez, American Problems in Int. Law, 24.

Spanish-American, since it is also maintained by Brazil, and is in fact the only one for which the grounds are apparent. But, from the review just made of actual international agreements and settlements, three facts stand clearly out: (1) That the principle was not expressly referred to in the earlier treaties, and that it has not been so constantly invoked nor has its practical effect been by any means so important as writers and learned advocates have sometimes asserted; (2) that as to the date of its application there is a radical and permanent disagreement, based upon historical facts that cannot be altered; and (3) that it was only after the lapse of years, when wars had opened the way to claims based on violence and the spectre of conquest had arisen, that enough importance began to be attached to the date to cause it to be mentioned in treaties. As a safeguard against this peril, an attempt was made to establish, without regard to all the facts, a general principle, having the aspect of a rule of law, which any power seeking to establish or to enlarge its boundaries by force might be charged with having violated. This attempt was, however, confined to South America, for the obvious reason that there was not a single Central American State that could claim to have been independent earlier than 1821. "In South America," says a writer heretofore quoted, "boundary controversies have been based generally on the theory that the right to the disputed zone is derived from the *uti possidetis of 1810,* which is vague and sometimes conflicting and on that account has often led to three countries claiming the same territory."[50]

[50] Alvarez, American Problems in International Law (N. Y., 1909), 94. The Author is counsellor to the Chilean Foreign Office.

Again, referring to the same subject, he says:

> "In the settlement of disputes concerning the delimitation of boundaries a principle of purely American origin is frequently involved, namely, the *Uti Possidetis of 1810,* which has been recognized by many of the States of the New World in treaties, conventions, and acts. This principle modifies, defines, and at the same time is influenced by the general principle of long continued pacific possession of disputed territory."[51]

In the acts of the Panama Congress, before which, in view of the objects of the meeting, the territorial question was necessarily important, the phrase *uti possidetis* is not found; and this in spite of the fact that Colombia, which seems to have taken the lead in introducing it into diplomatic correspondence, distinctly proposed its adoption in the discussions leading up to the Congress. This fact is stated by Señor Pedro Gual, Secretary of State for Foreign Affairs, who, in his report to the Colombian Congress, April 17, 1823, referring to the steps taken to bring about an American Confederation by means of a Congress at Panama, specified, as one of the articles which his Government had proposed:

> "II. That in order to render this guarantee (of territories) effective, the *uti possidetis* of 1810, according to the demarcation of Territory of each Captaincy-General or Viceroyalty, erected into a sovereign state, be taken as the rule."[52]

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[51] Id. 96.

[52] 10 Br. & For. State Papers, 742-743.

The Congress met on June 22, 1826, *Colombia, Central America,* Peru and Mexico being represented. At the last of the ten meetings, which was held on the 15th of July, there were signed (1) a "treaty of union, league, and perpetual confederation," (2) an agreement for the periodical reassembling of the Congress at Tacubaya, in Mexico, (3) a convention fixing the military forces to be furnished by each Republic for the common defense, and (4) an agreement as to the organization of the confederate army. The only one of these instruments in which boundaries are mentioned is the first. It appears by the protocols of the Congress that on the 11th of July, the draft of the treaty of "union" being under consideration, the plenipotentiaries of Central America, when Art. 21 was read, proposed to supplement it by "an additional article, whereby the limits of each nation, as fixed by amicable arrangements to be made according to circumstances, should be mutually guaranteed." The proposed article was read and agreed to, and was numbered 22. These two articles, forming part of the treaty of "Union," read as follows:

> "Article 21. The contracting parties solemnly obligate and bind themselves to uphold and defend the integrity of their respective territories, earnestly opposing any attempt of colonial settlement in them without authority of and dependence upon the Governments under whose jurisdiction they are, and to employ to this end, in common, their forces and resources if necessary.
>
> "Article 22. The contracting parties mutually guarantee the integrity of their territories as soon as, by virtue of special conventions concluded between each other, their respective

> boundaries shall have been determined; and the preservation of these frontiers shall then be under the protection of the confederation."[53]

As is generally known, the treaties never became operative, Colombia alone having approved them and she only partially.

It is sometimes stated that the *uti possidetis* of 1810 was proclaimed by the Congress at Lima in 1848, but the statement appears to be not altogether accurate. The assembling of this Congress, which met on Dec. 11, 1847, on the invitation of the Peruvian Government, and in which Bolivia, Chile, Ecuador, New Granada (Colombia), and Peru were represented, was due to the apprehension felt as to the expedition which General Flores was organizing in Spain to recover the government of Ecuador. In the instructions of the Peruvian Government of Nov. 30, 1847, to its plenipotentiary, we therefore find this paragraph:

> "There will be a stipulation made between the allied nations to preserve their territorial integrity: consequently, they will not permit any foreign power, under any pretext whatever, to occupy any part whatever, no matter how small it may be, of the territory of any of the allied States, who for fixing their limits will adhere to the rule of the *uti possidetis* of 1824, when the war of independence ended with the battle of Ayacucho."[54]

December 16, 1847, the plenipotentiary of New Granada, in accord with the representatives of Chile and

[53] Treaty of perpetual union, league, and confederation between the Republics of Colombia, Central America, Peru, and the United Mexican States, signed at Panama, July 15, 1826: First Int. Am. Conference, Historical Appendix, IV. 177, 184, 188.

[54] Aranda, Congresos y Conferencias Internacionales, I. 87.

Bolivia, presented to the Congress a project of a treaty of Confederation. By Art. VII of this project it was proposed that the Confederated Republics should "recognize as a principle founded in perfect right, for the fixing of their respective limits, the *uti possidetis* of 1810"; that, in order to mark such limits, when they were "not found in a natural and precise way" (donde no lo estuvieren de una manera natural y precisa), they should name commissioners, who, having met, and recognizing as far as possible the territory involved, should determine the dividing line of the two Republics, taking the summits dividing the waters, the *thalweg* of the rivers, or other natural lines, when the localities permitted, to which end they should have power to make the necessary exchanges and compensations of territory, in the manner most conducive to the reciprocal convenience of the two Republics; that, if the line adopted by the commissioners should not be approved, the matter should be submitted to the arbitral decision of the Congress of Plenipotentiaries of the Confederated Republics; and that "the Republics which, having been parts of the same State at the proclamation of independence, were separated after 1810," should be considered as having the boundaries which they recognized as theirs "at the time they were constituted," without prejudice to treaty settlement.[55]

The Plenipotentiary of Peru presented on the same day the bases of a similar treaty; but, in conformity with his instructions, he proposed (Art. VI), as the boundary rule, "the *uti possidetis* of 1824, after the termination of the war of independence with the battle of Ayacucho."[56]

[55] Aranda, Cóngresos y Conferencias Internacionales, I. 92, 93, 96, 97.
[56] Id. I. 102, 104.

Dec. 17, 1847, the Congress took up the New Granadian project. When Art. VII was reached, Peru proposed to substitute the *uti possidetis* of 1824 for that of 1810. A majority of the Plenipotentiaries expressed the view that the battle of Ayacucho had nothing to do with the discussion, and had created no new right as to limits; that the Spanish-American Republics could found their territorial rights only on the dispositions of the Spanish Government, in force at the time of the declaration of independence, and on the treaties and conventions celebrated since that date, and this was what the article provided. The Peruvian Plenipotentiary asked that the examination of the article be suspended so that he might take the instructions of his Government on the subject. Jan. 8, 1848, he presented some amended articles, among which was a draft of Art. VII substantially as it stood in the final treaty. This treaty was signed February 8. Art. VII reads as follows:

> "Article VII. The Confederated Republics declare their right is perfect to keep the boundaries of their territories as they existed at the time of the independence from Spain of the respective Viceroyalties, Captaincies-general or Presidencies, into which Spanish America was divided; and in order to mark out said boundaries where they are not found in a natural and definite way, they agree that in such case the Governments of the Republics interested shall appoint commissioners, who having met and recognizing as far as may be possible the territory under consideration, shall determine the dividing line of the Republics, taking the summits that separate the waters and *thalweg* of the rivers, or other natural lines, provided the localities

permit it; to which end they shall be able to make the necessary and compensatory exchanges of land, in such manner as may best suit the reciprocal convenience of the Republics. If the respective Governments do not approve the demarcation made by the commissioners, or if the latter are not able to come to an agreement in order to make it, the matter shall be submitted to the arbitral decision of one of the Confederated Republics, or of some friendly Nation, or of the Congress of the Plenipotentiaries.

"The Republics which, having been parts of the same State at the proclamation of independence, were separated after 1810, shall be kept within the boundaries which they recognized for themselves, without prejudice to the Treaties they may have celebrated or shall celebrate in order to vary or perfect them in conformity with the present article.

"What is provided in this article shall in no way alter the Treaties or Conventions concerning boundaries celebrated between any of the Confederated Republics, nor constrain the liberty which these Republics may have to arrange among themselves their respective boundaries."[57]

It thus appears that in the final treaty the specification of a date when the several viceroyalties, captaincies-general and presidencies became independent of Spain was omitted, the year 1810 being mentioned only in connection with States which split up *after* the movement for independence began.

In the so-called Continental Treaty, signed Sept. 15, 1856, by the Ministers of Peru, Chile, and Ecuador, it was agreed (Art. XIII) that none of the contracting

[57] Aranda, I. 109, 141, 143, 175, 176.

parties should cede or pledge any part of its territory or permit therein any foreign establishment, but:

> "This stipulation shall not prevent the cessions which the said States may make one to the other to regulate their geographical demarcations or to fix natural limits to their territories, or to determine with mutual advantage their boundaries."[58]

Guatemala, Salvador, Costa Rica and Mexico gave their adhesion to this treaty. Besides, on November 9, in the same year, a similar agreement was concluded by Mexico, Guatemala, Salvador, Costa Rica, New Granada (Colombia), Venezuela and Peru, through their plenipotentiaries at Washington.[59]

Nov. 14, 1864, on the invitation of the Peruvian Government, a Congress, composed of representatives of Chile, Salvador, Venezuela, Colombia, Ecuador, Peru, and Bolivia, met at Lima. An envoy from the Argentine Republic was present, but without authority to sign anything. During the Congress, the conflict between Peru and Spain over the Chincha islands took place. Although various topics were embraced in the invitation, there were adopted (Jan. 23, 1865) only two conventions: one, of "Union and Defensive Alliance"; the other, on the "Maintenance of Peace." The former contained an article (IX) like Art. XIII of the Continental Treaty of 1856.[60]

It is true that Peru has on certain occasions, one of which seems to have been as early as 1853, invoked "the principle of *uti possidetis* of 1810" against a

[58] Aranda, I. 232.
[59] Alvarez, Le Droit Int. Américain, 55-57.
[60] Alvarez, Le Droit Int. Américain, 58-59; Aranda, I. 423.

government that professed to maintain it. Notably was this the case when, in the closing days of the War of the Pacific, the representative of Peru, together with the representatives of certain other Spanish-American countries, including those of Salvador and Santo Domingo but not that of Chile, signed at Caracas, on August 14, 1823, Bolivar's birthday, a protocol, "semi-officially agreed to *ad referendum,*" declaring the "duty" of upholding the integrity of territories "in conformity with the principle of *uti possidetis* in 1810" and "the obligation of ignoring the so-called Right of Conquest."

4. *The "Uti Possidetis Juris of 1810."*

To the phrase "*uti possidetis,*" in connection with the year 1810, there is occasionally added the word "*juris.*" The term "*uti possidetis* of 1810," says a South American publicist, "is generally understood to mean the territories which the respective countries had the right to possess according to the Spanish administrative divisions obtaining at that date";[61] and, reserving always the question of date, it may be remarked that the insertion of the word "*juris,*" with a view to emphasize the idea of the right to possess,[62] and to divest the phrase "*uti possidetis*" of its warlike associations, appears to require no comment. No nation, unless under stress of war, when the right of conquest arises, will admit bare possession, without regard to the nature of its origin or the time and circumstances of its duration, as a source of title. As has heretofore been pointed out, the principle of *uti possidetis,* when

[61] Alvarez, American Problems of Int. Law, 22.
[62] Alvarez, Le Droit Int. Américain, 65.

invoked for the amicable definition of international boundaries, is not understood in so severe and summary a sense. Nor does the principle, as often seems to be supposed, acquire in Spanish-America a special juristic significance, by reason of the fact that it is invoked there by nations formerly subject to the same sovereign. Such a condition is not peculiar to Spanish-America. It equally exists in the United States, the boundaries of whose original States were founded on British grants and charters, and were eventually adjusted on the strength of those and of other documents, imperial and colonial, and of occupation, prescription and mutual convenience. No one thought of denying, as a general principle, the force of imperial acts passed prior to the Independence.

Apart from the usual and reasonable interpretation above defined, the phrase *"uti possidetis juris"* is meaningless and self-contradictory. To say that the word "juris" excludes altogether the consideration of possession *de facto,* is to make the words self-destructive. The judgment of *"uti possidetis"* cannot be predicated of a situation from which the thought of continued physical possession is wholly excluded. Such a use of terms would be purely fanciful.

It remained, however, for the eminent and ingenious advocates of Colombia, in the arbitration before the President of France, not only to ascribe to Costa Rica the *"uti possidetis juris* of 1810," but to give to it a construction as novel as it was fantastic. This was that boundaries, as between the political divisions which form the States of Spanish-America, could be determined only by imperial "laws" promulgated prior to 1810; that by "laws" could be understood only acts

such as actually were, or, coming after its publication, were proper to be, included in the *Recopilación de las Leyes de Indias;* and that all capitulations, official commissions, reports and despatches, and all occupations, prescriptions and other customary proofs of the historic evolution of right and title, must be rejected as incompetent and unavailing.

To the dazzling effect of this startling and extraordinary thesis there probably may be attributed the award to Colombia of certain islands belonging, not to Costa Rica, but to Nicaragua. But, however this may be, it is certain that the thesis was destitute of other foundation than what were conceived to be the necessities of Colombia's case; that the effect of its adoption would be to leave the countries of Spanish-America for the most part without any basis for the fixing of their limits; and that its assumption as to the state or rule of Spanish law prior to the independence of the colonies has been in principle repudiated by two awards of the Government of Spain itself, rendered, respectively, in the boundary arbitration between Colombia and Venezuela in 1891, and in the boundary arbitration between Honduras and Nicaragua in 1906.

In the treaty between Colombia and Venezuela of Sept. 14, 1881, the contracting parties, having, as they declared, been unable "to come to an agreement as to their respective rights or *uti possidetis juris* of 1810," submitted the question to the King of Spain, it being agreed that to Venezuela belonged "all the territory appertaining to the jurisdiction of the ancient Captaincy-General of Caracas by Royal Decrees of the ancient Sovereign down to 1810," and to Colombia "all

that territory which by similar decrees and at that date belonged to the Viceroyalty of Santa Fé." By a protocol, however, signed at Paris, February 15, 1886, his powers were "amplified," and he was authorized to fix the line "as may be most in accordance with existing documents whenever any point may arise about which there is not all the clearness that is desirable." The award of the Queen Regent of Spain, rendered March 16, 1891, treated of the divisional line in six sections, as to the second and fourth of which, the parties having reached an accord, no further action was necessary. As to the first and third, the documents were found to be in agreement. The Royal warrant of February 15, 1786, creating the command of Barinas, which was invoked as the basis for the determination of the fifth section, was found to "give rise to doubts," so that the arbitrator was obliged here to invoke the power conferred by the protocol of 1886. For convenience, the sixth section was broken into two parts, as to the first of which the award rested upon a royal warrant appointing a governor for the new district of Cumaná in 1735; a despatch of this governor; a memorial addressed to the King by another governor in 1743; maps, returns of population, and official correspondence of the commander of the district; a report of the head of the Jesuit Missions on the Orinoco in 1749; a definition of the territory of the Lieutenancy of the Guayana, by a person who was also governor of Cumaná, in 1761; a despatch of the same official in the same year; a draft report on the boundary of the Guayana in 1760; a report of the governor of Caracas in 1762; maps by various Spanish geographers down to 1796, as well as two maps of later

date; and the description of a journey made by order and at the expense of the Archbishop and Viceroy of Santa Fé in 1782-1783. These documents, it was declared, "*clearly fix the line of frontier as far as the law is concerned.*" As to the second part of the sixth section, the disputants invoked but differently interpreted a Royal Warrant of May 5, 1768. The arbitrator pronounced its terms "not so clear and precise as they ought to be," and again invoked the protocol of 1886, basing the award in this part on the following grounds:

1. That Venezuela was "in *bona fide* possession of the territories to the west of the Orinoco, Casiquiare, Negro Rivers, which form the boundaries assigned on this side to the Province of Guayana, in the abovementioned Royal Warrant of 1768."

2. That "Venezuelan interests are largely represented in the aforesaid territories, encouraged by the confident belief that they were established in the dominions of the United States of Venezuela."

3. That "the Rivers Atabapo and Negro trace a clear, definite and natural frontier, with only one break of a few kilometres from Yávita to Pimichin, thus respecting the boundaries of these two villages."

In the award rendered by the King of Spain, Dec. 23, 1906, on the boundary question between Honduras and Nicaragua, the arbitrator held that "the Spanish provinces of Honduras and Nicaragua were formed by *historic evolution,*" until, by virtue of the Royal Ordinance as to Intendants of Provinces of 1786, they were constituted as two distinct Intendencias of the Captaincy-General of Guatemala; that "the time of their

emancipation from Spain" was "1821"; that a Royal Cédula affecting boundaries, though issued prior to the independence, might be treated as not having effected any change where it was tacitly allowed to be or was in fact locally disregarded; that the exercise of political jurisdiction in a positive and permanent manner must be taken into account in fixing the limits; that temporal divisions should conform to the spiritual, and that the exercise of ecclesiastical jurisdiction should be treated as proof of the extent of temporal jurisdiction; that (as the treaty itself indicated) natural boundaries should be preferred to artificial ones; that the appointments of colonial governors, the communications of local colonial authorities to the home government, and even the published writings of such authorities, were to be accepted as sources of authority for the demarcation of the boundaries; that diplomatic documents of the independent governments concerned, and even the statements of other interested governments, were likewise to be received; that the descriptions in maps and geographies and books of travel, Spanish, English, French, German and American (North and South), examples of which were cited from 1571 to 1901, were also to be consulted. On the proofs thus assembled, the divisional line was awarded.

VI. Question Between Costa Rica and Panama.

In the treaty of Union, League and Confederation between the United Provinces of the Centre of America and the Republic of Colombia, predecessors of Costa Rica and Panama, signed at Bogota, March 15, 1825, to which the present controversy runs back, it was agreed:

> "Article V. The two Contracting Parties mutually guarantee the integrity of their respective territories against the attempts and incursions of the subjects of the King of Spain and his adherents, on the footing on which they existed before the present war of independence."
>
> "Article VII. The United Provinces of the Centre of America and the Republic of Colombia formally obligate and bind themselves to respect their boundaries as they exist at present, reserving to themselves to settle in a friendly manner, by means of a special convention, the demarcation of the divisional line between the two States, so soon as circumstances permit, or whenever one of the Parties shall manifest to the other its disposition to enter into such negotiations."

It was further stipulated (Art. VIII) that, in order to facilitate this "boundary negotiation," the parties should be at liberty to send commissioners to "visit all the points and places on the frontiers and prepare such charts as they may deem convenient and necessary in order to establish the dividing line."

Meanwhile, the two Governments were to co-operate in preventing "the colonizations of unauthorized adventures in that part of the coasts of Mosquitos included between Cape Gracias á Dios and the River Chagres, * * * without having first obtained the permission of the Government to which it belongs in dominion and property."

Upon the strength of this treaty, by which the contracting parties, while reserving the definitive settlement of their divisional line for a special convention, merely bound themselves "to respect their boundaries as they exist at present," the ardent and unshrinking

advocates of Colombia, in the arbitration before the President of France, did not hesitate to affirm that the Central-American Republic not only had accepted the "*Uti possidetis juris* of 1810," but had accepted it in the fanciful sense in which they themselves in 1900 sought to interpret it. The simple and obvious facts speak for themselves.

Colombia dates her independence from 1810, when the movement for emancipation began in that quarter. The Constitution of the Republic of Colombia, adopted at Cúcuta, Aug. 30, 1821, declared (Title II, Section 1, Art. VI) that the territory of the Republic was "the same which was formerly comprehended in the Ancient Viceroyalty of New Granada and the Captaincy-General of Venezuela." Precisely the same clause, with the same numbering, appears in the Constitution of April 29, 1830. The Constitution of New Granada of April 20, 1843, Venezuela and Ecuador having become independent States, declared (Art. VII):

> "The limits of the territory of the Republic are the same which in the year 1810 divided the territory of the Viceroyalty of New Granada from that of the Captaincies-General of Venezuela and Guatemala, and from that of the Portuguese possessions in Brazil; and * * * from the Republic of Ecuador."

This clause is repeated (Art. II) in the Constitution of New Granada of May 22, 1858, and, the name of Colombia having been resumed, in the Constitution of the United States of Colombia of May 8, 1863.

Central American independence dates from Sept. 15, 1821, when it was declared at the town hall in Guatemala City. The Constitution of the Republic of the

Centre of America of Nov. 22, 1824, embracing the five States of Costa Rica, Nicaragua, Honduras, Salvador, and Guatemala, declared (Tit. I, Sec. II, Art. V) simply that the territory of the Republic was "that which formerly composed the ancient Kingdom of Guatemala," excepting, for the time being, the province of Chiapas.

In the Constitution of "The State of Costa Rica," of January 21, 1847, there may be found (Chap. II, Section I, Art. XXV) a somewhat detailed definition of the boundaries on all sides, embracing, on the North, the Atlantic Ocean from the mouth of the San Juan river to the Escudo de Veragua, and, "on the East, from the latter point to the River Chiriquí." In the next year there was formed the Republic of Costa Rica, and in its constitution it was declared (Chap. I, Sec. 4, Art. VII) that "the limits of the territory of the Republic are those of the *Uti possidetis* of 1826." The Constitution of Dec. 7, 1871, (Tit. I, Art. III) declares:

> "The territory of the Republic * * * is bounded * * * on the southeast, by Colombia, in regard to which the *uti possidetis* of 1826 shall be observed."[63]

The year 1826 is the date of the exchange of the ratifications of the treaty of 1825 with Colombia, the exchange having been made at Guatemala City, June 16, 1826.[64]

In the exchange of the ratifications, two changes were on motion of Central America incorporated into

[63] Rodríguez, American Constitutions, I. 326.

[64] Colección de los Tratados Internacionales celebrados por la República de Costa Rica, II. 10.

the treaty. One of these referred to the powers of the proposed General Assembly of American States. The other related to Art. V, above quoted. The Central American Congress, in approving the treaty, amended that Article by inserting, before the word "existed," the word "naturally" (*naturalmente*), and transposing the last clause, so as to make the clause read:

> "Article V. The two Contracting Parties mutually guarantee the integrity of their respective territories on the footing on which they naturally existed before the present war of independence, against all attempts and incursions of the subjects of the King of Spain and his adherents."

The amendment evidently refers to certain natural landmarks that had in colonial times been recognized as indicating the limits of the political divisions which had come to be included in the two Republics.

That the words "naturally existing" were understood to refer to natural limits is shown by the report of Señor Restrepo, Secretary for Foreign Affairs, in his report to the Colombian Congress, March 21, 1827, in which he said:

> "The Ratifications of the Treaty of Union, League, and Confederation, between Colombia and Central America had been already exchanged, our Minister entrusted with this Negotiation having verified the same. But that Government having altered, in the Act of Ratification, the meaning of the 5th Article, which treats of the settlement of the limits, by describing them as the *natural* limits; as well as the 17th Article, which elected the American Assembly as the

> Judge, Arbitrator and Conciliator, of the Disputes and differences between the Confederate States, which general stipulation was restricted by the Republick of Central America; these alterations will prevent the exact observance of the Treaty. I shall present to Congress a Copy of the said Ratification, for its consideration."[65]

The Congress permitted the ratifications to stand. As appears by numerous treaty stipulations heretofore quoted, the countries of Spanish-America deemed it to be important, not only for reasons of future convenience but also because of the uncertainties that prevailed as to their territorial rights, to adopt as far as possible natural boundary lines. That this thought existed in the mind of Colombia herself in 1826 appears by the report of Señor Revenga, Secretary of State for Foreign Affairs, presented to the national Congress on the 2nd of January in that year. Referring in that report to the subject of boundaries, and to the instructions which had been given in respect of Peru to seek "the most convenient, clear and natural frontiers," he said:

> "The same object has been kept in view in regard to the settling of our boundaries with the Central Republic, and the same will be attended to in defining them on the East and Southeast of Colombia. Being in possession of such an extent of territory that many generations must pass away before its population can become redundant, it appeared prudent to make it a principal consideration to provide against cases of future dispute."[66]

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[65] 14 Br. & For. State Papers, 1139.

[66] 13 Br. & For. State Papers, 1010-1011.

By the treaty between Colombia and Peru, signed Sept. 22, 1829,[67] the parties agreed even to "cede" to each other such small portions of territory as might be "necessary to fix the boundary line in a more natural and precise manner."

It is obvious, from whatever point of view we approach the subject, that the Republic of Colombia and the Republic of the Centre of America, in entering into the treaty of 1825, intended nothing more than the demarcation of their common frontier on grounds of right and of convenience such as have usually been invoked by governments everywhere under similar conditions.

New York, August, 1911.

[67] Supra, p. 23.